List of Subjects in 10 CFR Part 50

Antitrust, Classified information, Criminal penalties, Fire protection, Intergovernmental relations, Nuclear power plants and reactors, Radiation protection, Reactor siting criteria, Reporting and recordkeeping requirements.

For the reasons given in the preamble and under the authority of the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, and 5 U.S.C. 552 and 553, the NRC is adopting the following amendment to Part 50.

PART 50—DOMESTIC LICENSING OF PRODUCTION AND UTILIZATION FACILITIES

1. The authority citation for Part 50 continues to read as follows:

Authority: Secs. 102, 103, 104, 105, 161, 182, 183, 186, 189, 68 Stat. 936, 937, 938, 948, 953, 954, 955, 956, as amended, sec. 234, 83 Stat. 1244, as amended (42 U.S.C. 2132, 2133, 2134, 2135, 2201, 2232, 2233, 2236, 2239, 2282); secs. 201, as amended, 202, 206, 88 Stat. 1242, as amended, 1244, 1246 (42 U.S.C. 5841, 5842, 5846).

Section 50.7 also issued under Pub. L. 95–601, sec. 10, 92 Stat. 2951 (42 U.S.C. 5851). Section 50.10 also issued under secs. 101, 185, 68 Stat. 955, as amended (42 U.S.C. 2131, 2235); sec. 102, Pub. L. 91–190, 83 Stat. 853 (42 U.S.C. 4332). Sections 50.13, 50.54(dd), and 50.103 also issued under sec. 108, 68 Stat. 939, as amended (42 U.S.C. 2138). Sections 50.23. 50.35, 50.55, and 50.56 also issued under sec. 185, 68 Stat. 955 (42 U.S.C. 2235). Sections 50.33a, 50.55a and Appendix Q also issued under sec. 102, Pub. L. 91–190, 83 Stat. 853 (42 U.S.C. 4332). Sections 50.34 and 50.54 also issued under sec. 204, 88 Stat. 1245 (42 U.S.C. 5844). Sections 50.58–50.91, and 50.92 also issued under Pub. L. 97–415, 96 Stat. 2073 (42 U.S.C. 2239). Section 50.78 also issued under sec. 122, 68 Stat. 939 (42 U.S.C. 2152). Sections 50.80–50.81 also issued under sec. 184, 68 Stat. 954, as amended (42 U.S.C. 2234). Appendix F also issued under sec. 187, 68 Stat. 955 (42 U.S.C. 2237).

2. In § 50.36, paragraphs (c)(2) and (3) are revised to read as follows:

§ 50.36 Technical specifications.

* * * * *

(c) * * *

(2) *Limiting conditions for operation.* (i) Limiting conditions for operation are the lowest functional capability or performance levels of equipment required for safe operation of the facility. When a limiting condition for operation of a nuclear reactor is not met, the licensee shall shut down the reactor or follow any remedial action permitted by the technical specifications until the condition can be met. When a limiting condition for operation of any process step in the system of a fuel reprocessing plant is not met, the licensee shall shut down that part of the operation or follow any remedial action permitted by the technical specifications until the condition can be met. In the case of a nuclear reactor not licensed under § 50.21(b) or § 50.22 of this part or fuel reprocessing plant, the licensee shall notify the Commission, review the matter, and record the results of the review, including the cause of the condition and the basis for corrective action taken to preclude recurrence. The licensee shall retain the record of the results of each review until the Commission terminates the license for the nuclear reactor or the fuel reprocessing plant. In the case of nuclear power reactors licensed under § 50.21(b) or § 50.22, the licensee shall notify the Commission if required by § 50.72 and shall submit a Licensee Event Report to the Commission as required by § 50.73. In this case, licensees shall retain records associated with preparation of a Licensee Event Report for a period of three years following issuance of the report. For events which do not require a Licensee Event Report, the licensee shall retain each record as required by the technical specifications.

(ii) A technical specification limiting condition for operation of a nuclear reactor must be established for each item meeting one or more of the following criteria:

(A) *Criterion 1.* Installed instrumentation that is used to detect, and indicate in the control room, a significant abnormal degradation of the reactor coolant pressure boundary.

(B) *Criterion 2.* A process variable, design feature, or operating restriction that is an initial condition of a design basis accident or transient analysis that either assumes the failure of or presents a challenge to the integrity of a fission product barrier.

(C) *Criterion 3.* A structure, system, or component that is part of the primary success path and which functions or actuates to mitigate a design basis accident or transient that either assumes the failure of or presents a challenge to the integrity of a fission product barrier.

(D) *Criterion 4.* A structure, system, or component which operating experience or probabilistic risk assessment has shown to be significant to public health and safety.

(iii) A licensee is not required to propose to modify technical specifications that are included in any license issued before August 18, 1995, to satisfy the criteria in paragraph (c)(2)(ii) of this section.

(3) *Surveillance requirements.* Surveillance requirements are requirements relating to test, calibration, or inspection to assure that the necessary quality of systems and components is maintained, that facility operation will be within safety limits, and that the limiting conditions for operation will be met.

* * * * *

Dated at Rockville, Maryland, this 13th day of July 1995.

For the Nuclear Regulatory Commission.

John C. Hoyle,

Secretary of the Commission

[FR Doc. 95–17723 Filed 7–18–95; 8:45 am]

BILLING CODE 7590–01–P

DEPARTMENT OF ENERGY

Office of Energy Efficiency and Renewable Energy

10 CFR Part 451

[Docket No. EE–RM–94–301]

Renewable Energy Production Incentives

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Final rulemaking.

SUMMARY: The Department of Energy (DOE) Office of Energy Efficiency and Renewable Energy (EE) is today issuing a final rule to implement a renewable energy production incentive program in response to the requirements of section 1212 of the Energy Policy Act of 1992. This program provides for incentive payments to owners or operators of qualified renewable energy facilities, subject to the availability of appropriations. This rule contains procedures for application, qualification requirements, procedures for calculation of incentive payments, and administrative remedies.

DATES: *Effective Date:* This regulation is effective August 18, 1995.

Application Date: Applications for incentive payments for energy produced in fiscal year 1994 shall be due September 5, 1995.

FOR FURTHER INFORMATION CONTACT:

Kurt Klunder, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Forrestal Building, Mail Station EE–10, 1000 Independence Avenue, SW, Washington, DC, 20585, (202) 586–4564.

Michael W. Bowers, Esq., U.S. Department of Energy, Office of General Counsel, Forrestal Building,

Mail Station GC–72, 1000 Independence Avenue, SW, Washington, DC 20585, (202) 586–9507.

SUPPLEMENTARY INFORMATION:

I. Introduction

On May 13, 1994, DOE issued a Notice of Proposed Rulemaking for the Renewable Energy Production Incentive program. (59 FR 24982). The goal of the incentive program is to advance the commercialization and use of renewable energy electric generation systems in the United States.

The stated purposes of title XII of the Energy Policy Act of 1992, of which section 1212 is part, are promotion of (1) increases in the production and utilization of energy from renewable energy sources; (2) further advances of renewable energy technologies; and (3) exports of United States renewable energy technologies.

The implementation of section 1212 draws upon relevant attributes of sections 1914 and 1916 of the Energy Policy Act of 1992. Section 1914 amended the Internal Revenue Code to provide a tax credit of 1.5 cents per kilowatt-hour, adjusted for inflation, for electricity generated from wind or from biomass derived from organic matter grown exclusively for use in generating electricity. 26 U.S.C. § 45. Section 1916 amended the Internal Revenue Code to make permanent the energy investment tax credit for non-utility investors in solar and geothermal property. 26 U.S.C. § 48(a)(2). Sections 1914 and 1916 were designed to assist in making certain emerging renewable energy technologies cost competitive. The program authorized by section 1212 provides State instrumentalities and nonprofit electric cooperatives incentives for the production of electricity using certain renewable resources in a manner that complements the incentives offered to taxable entities under sections 1914 and 1916 of the Energy Policy Act.

In response to the Notice of Proposed Rulemaking, DOE received written input from 52 commenters and heard testimony from seven organizational representatives at a public hearing held on June 16, 1994 in Washington, D.C. After considering the comments received on the proposed rule, a number of changes have been made to the final rule contained herein.

With the issuance of this final rule, DOE amends title 10, Chapter II of the code of Federal Regulations to establish a renewable energy production incentive program pursuant to section 1212 of the Energy Policy Act of 1992. 42 U.S.C. § 13317.

II. Discussion of Comments

Section 451.1 Purpose and Scope

DOE proposed that renewable energy production incentive payments be made only for the generation of electric forms of energy. Three commenters suggested that such payments be extended to the production of non-electric forms of energy. Section 1212 of the Energy Policy Act specifies that payments are to be made only for ''electric energy generated and sold,'' and thus provides no authority to expand incentive payments to include non-electric forms of energy.

Section 451.2 Definitions

DOE proposed defining closed-loop biomass as plant matter, other than standing timber, grown for the sole purpose of being used to generated electricity. Several comments were received on this proposed definition. Some commenters wanted to modify the definition to include dedicated tree farms planted prior to October 1, 1993, while others wanted to include secondary uses of plant crops. DOE has responded to these comments in part by designating as closed-loop biomass all harvests, after the first harvest, of fast growing trees planted before October 1, 1993 if such harvests occur during the qualifying period. DOE made additional changes in the definition to make it consistent with the definition of closed-loop biomass contained in section 1914 of the Energy Policy Act. The suggested secondary use of plant matter is not considered closed-loop biomass since such use would be inconsistent with the section 1914 statutory definition.

In response to several comments requesting clarification as to what portion of electric energy generated is eligible for incentive payments, DOE added the term and definition for ''net electric energy generated'' in the final rule. DOE is adding this definition to draw a distinction between total electricity generated and the actual amount of electricity sold after deducting the electric energy used internally by the facility to operate the pumps, motors, controls, lighting, heating and cooling, and other systems needed to keep the facility operational. Such parasitic energy does not qualify for incentive payments. The addition of the term ''net electric energy generated'' is intended to clarify this point.

DOE proposed defining ''nonprofit electrical cooperatives'' as a cooperative association that is treated as tax exempt under section 501(c)(12) of the Internal Revenue Code and is organized under the laws of any State for the purpose of providing electric service to its members and other customers. DOE received several comments from cooperatives indicating that some cooperatives, while not organized to earn profit, are not treated as tax-exempt under section 501(c)(12). These cooperatives do incur tax liability from time to time, but within narrow limits that would not enable the organizations to benefit from incentives through tax credits. In consideration of these comments and absent legislative history to the contrary, DOE has changed the definition of nonprofit electrical cooperative to include those operated on a not-for-profit basis. To eliminate the possibility of double coverage, such entities are requires to certify as part of the application under section 451.8 that they will not claim tax credits for electricity produced during the same fiscal year for which incentive payments are requested.

DOE proposed defining ''renewable energy facility'' in sufficiently broad terms to include the designated technologies while retaining consistency with the language in section 1212 of the Energy Policy Act. A key part of the definition referenced ''a system or integrated set of components.'' Three commenters requested that the definition be modified to clarify the minimum facility that constitutes a renewable energy facility. In response to this request, DOE has revised the definition in the final rule to clarify that a single module or unit, such as, a wind turbine together with its tower and supporting pad, or an aggregation of such units falls within the definition of a ''renewable energy facility.''

Several commenters sought to expand the definition of ''renewable energy facility'' to include facilities that burn municipal solid waste. DOE is precluded from including municipal solid waste in the final rule because the language of the statute specifically excludes ''municipal solid waste which is burned'' to create heat. 42 U.S.C. § 13317(b)(1). Five commenters suggested that methane from sewage treatment and anaerobic digestion facilities and hydrogen derived from biomass sources should be clearly recognized as qualified renewable energy sources when used to generate electricity. DOE concurs that these sources are biomass energy sources.

Renewable energy facilities may include: (1) Solar photovoltaic systems, which convert solar light to direct current electricity; (2) solar thermal systems, which use a fluid heated by the sun to directly or indirectly drive an electric generator; (3) wind conversion systems, which capture wind energy to

drive an electric generator; (4) biomass energy systems, which generate electricity using heat derived from combustion of plant matter, or from combustion of gases or liquids derived from plant matter, animal waste, or sewage, or from combustion of gases derived from landfills, or which derive hydrogen from these same sources to generate electricity using fuel cells; and (5) geothermal systems, which generate electricity using naturally-occurring underground heat.

Several editorial changes have been made to § 451.2. First, the illustrative list of renewable energy facilities has been deleted to avoid confusion. Second, the list of excluded renewable energy sources has been incorporated in the definition of ''renewable energy source.''

Section 451.4 What is a Qualified Renewable Energy Facility

DOE proposed, consistent with the provisions in section 1212, a list characterizing the attributes of a qualified renewable energy facility, and sought in proposed paragraph (b) to clarify a potential ambiguity with regard to what constitutes ownership. Recognizing that State laws vary in assignment of ownership of financed capital facilities, DOE proposed wording the ownership requirements to cover situations in which a State, political subdivision, or a cooperative has all rights to the beneficial use of the qualified renewable energy facility, but legal title under State law is held by a source that provided secured financing for the benefit of the State, political subdivision, or cooperative.

A number of comments were received on ownership issues. Some of the commenters wanted the Department to extend the ownership criteria to include joint action agencies. Joint action agencies are State-sanctioned organizations of public power electric utilities established to achieve economies of scale in equipment and power purchases or to jointly provide other utility services. These agencies are normally owned by their member utilities, but commenters have indicated that in some cases actual legal ownership of the joint agency may be unclear under State law. Accordingly, any joint action agency is considered to qualify under the ownership requirement if each member meets the classification requirement as an entity designated under the § 451.4(a) provision.

One commenter also requested that DOE clarify whether public school districts are deemed political subdivisions of a State. DOE recognizes the broad umbrella of the term ''political subdivision of a State.'' Generally, public school districts fall within the § 451.4(a) classification.

DOE proposed paragraph (c) regarding sale of electricity to track the language of section 1212. In the preamble of the proposed rule, DOE discussed its interpretation of the word ''sale'' as used in the phrase ''for sale in, or affecting, interstate commerce.'' Sale was interpreted to mean a transaction between two entities, who may be related, involving the sale of electric energy at fair market value. Based on this interpretation, electricity generated for use within the renewable energy facility would not constitute a sale. Twelve commenters requested further clarification of the requirement for such sale ''in or affecting interstate commerce.'' Specifically, they asked DOE to elaborate on the meaning of ''interstate commerce.'' Recognizing that activities within a State can affect interstate commerce, DOE has concluded that the statutory requirement concerning effect on interstate commerce is satisfied when electricity is sold to another party for consideration and has revised § 451.4(c) accordingly. DOE has also incorporated the use of the new term ''net electric energy generated,'' discussed under § 451.2 of this section of the preamble, to clarify that parasitic energy is not eligible for incentive payments.

Proposed paragraph (e) listed excluded renewable energy sources. In the case of excluded geothermal energy, certain characteristics of the reservoir were specified that included the phrase ''steam quality of 95 percent water or higher.'' Even though the Department did not receive any comments on this provision, clarifying language has been added in the final rule interpreting the meaning of this specification. The Department has interpreted the phrase ''a stream quality of 95 percent water or higher'' to mean a fluid composed of at least 95 percent water vapor. These exclusions have been moved to the definition of ''renewable energy source'' in section 451.2, of this final rule.

Proposed paragraph (f) tracked the language of section 1212 which requires that qualifying renewable energy facilities must first be used during the period beginning October 1, 1993, and ending on September 30, 2003. Several commenters requested that the Department clarify the term ''first used'' for facilities that have been converted to renewable energy. In response to these comments, the Department has inserted the term ''newly constructed'' in paragraph (e) to distinguish between facilities which are newly constructed and those existing facilities which are converted. A new paragraph (f) has been added that elaborates on the criteria that conversions of existing facilities must meet to quality for incentive payments. There are two possibilities for conversion. The first is based on converting an existing renewable energy facility. In consideration of the comments to address the eligibility of converting existing renewable energy facilities, DOE reviewed an IRS revenue ruling that specifies the qualifications of an eligible facility that contains some used property. The IRS ruled that such a facility would qualify for tax credit provided the fair market value of the used property is not more than 20 percent of the eligible facility's total value (i.e., the cost of the new property plus the value of the used property). Rev. Rul. 94–31, I.R. B. 1994–21,4. By revising proposed paragraph (f) (renumbered in this final rule as paragraph (e)), and adding paragraph (f), DOE has adopted this criterion in the final rule. Accordingly, a renewable energy facility that is refurbished such that the fair market value of any used property does not exceed 20% of the facility's total value and meets the other criteria specified in this part would be eligible for an incentive payment. Paragraph (f)(2) specifies eligibility when converting an existing non-renewable facility. The facility must be converted in part or in whole to a renewable facility and placed in use within the specified time period.

Section 451.5 Where and When to Apply

DOE proposed in paragraph (a) that owners or operators of qualified renewable energy facilities file applications only in response to an annual notice in the Federal Register. There was little comment on this proposal, but the tenor of other comments favored simplification of the application process. Consequently, DOE is eliminating the annual Federal Register notice and establishing a standard application period. In the final rule, DOE is requiring that owners or operators of qualified renewable energy facilities apply during the period beginning October 1 and ending December 31 of each year (except for fiscal year 1994) for an incentive payment for electricity generated and sold in the preceding fiscal year. Under paragraph (b)(2), applications for energy generated in fiscal year 1994 shall be due 45 days after the date of this rule. The extension of the application period for FY 1994 incentive payments was provided because the standard application period passed prior to the

publication of this rule. For clarification purposes, paragraph (b)(3) provides that if an applicant fails to file an application for payment for electric energy generated in any fiscal year, energy generated in that year cannot be subsequently claimed as eligible for an incentive payment.

Seventeen commenters requested that DOE provide a prequalification mechanism in the application process to reduce payment uncertainty. While DOE cannot guarantee an incentive payment, it is adding a provision, subparagraph (a)(1), for applicants to obtain a preliminary and conditional determination of eligibility for incentive payment. In addition, to assist the Department in preparing its annual budget requests, DOE is adding a provision, subparagraph (a)(2), requesting that the owner or operator of a qualifying renewable energy facility provide notification at least 6 months in advance of when the facility is first expected to be placed into service.

Section 451.6 Duration of Incentive Payments

A statement has been added to this section in the final rule to give notice of the sunset provision of Section 1212(f) of the statute.

Section 451.8 Application Content Requirements

DOE proposed in paragraph (f) that domestic components and equipment represent at least 50% of the capital cost of the qualified energy facility. Five commenters requested that the domestic content provision either be lowered or eliminated. In consideration of these comments and in recognition of U.S. international trade policies and tariff and trade agreements, DOE eliminated this proposed requirement.

DOE proposed in paragraphs (g) and (h) a requirement for an independently audited and certified statement of the annual and monthly metered number of kilowatt-hours generated and sold. Six commenters expressed concern about the cost and time requirements of this proposal. In response to these concerns, the Department is removing the ''independently audited'' provision, as well as the terms ''certified statement'' and ''class of customer.'' The Department is instead requiring that an authorized executive official of the applicant organization sign the application for the incentive payment which is to include a statement attesting to the accuracy of the information upon which the requested payment is based. A commenter proposed adding a statement in the rule regarding the consequences of falsifying parts of the application. DOE elected not to include a penalties provision because of the many remedies that are available for the falsification of an incentive payment application. For example, 18 U.S.C. § 1001 provides for criminal penalties where an applicant knowingly and willfully falsifies statements or makes fraudulent statements or representations. Also, DOE may under certain circumstances conduct an audit or require an independent audit as provided in § 451.9.

DOE proposed using kilowatt-hours as the unit of measurement for electric energy generated and sold, cents per kilowatt-hour as the unit of measurement for the amount of the incentive payment, the British thermal unit as the unit of measurement for heat, and British thermal units per pound as the measure for enthalpy. DOE received one comment which requested that DOE amend the proposed rule to comply with public laws and Executive Order 12770 directing preferential use of the International Systems of Units (SI). The commenter recommend the use of joules, cents per megajoule, and joules per kilogram as the units of measure in this rule. In response the Department revised all sections referring to British thermal units or British thermal units per pound by substituting joules or joules per kilogram as the primary text and including the English unit equivalent parenthetically. The principal text now conforms to SI standards for heat energy while the parenthetic citation allows direct comparison with legislative sources in those instances where the original legislation contains English unit citations. Where 2 heat measurements are required to calculate a dimensionless ratio or fraction, the rule does not specify the measuring units except to state that both measurements must be made in the same units. In the case of electric power and energy, DOE recognizes that the SI unit for energy is the joule; however, a joule per second is a watt and both watt and watt-hour (and kilowatt-hour) are considered derivatives of SI units and their use is considered to conform to the intent of Executive Order 12770. DOE has continued to use watt and watt-hour since the required electrical measurements will be made using these units and their non-use promotes increased opportunities for error on the part of the personnel involved in electric energy measurement, recording, compilation, and summation, and in application preparation.

DOE is adding a provision, § 451.8(i), to clarify that the total electrical energy claimed as eligible for incentive payments is the sum of net electric energy newly generated and accrued energy. Note that accrued energy is eligible for reimbursement at the same payment rate as the newly generated net electric energy.

DOE proposed that applicants provide wire transfer payment instructions. One commenter requested that this provision be broadened to include ''other payment instructions.'' DOE has incorporated this suggestion in this provision. To reflect the changes and modifications made to this section, some paragraph designations under this section have been changed.

Section 451.9 Procedures for Processing Applications

In order to meet its responsibility to ensure the accuracy of the metered energy claimed for incentive payments under this rule, DOE is reserving the right to require an independent audit, the cost of which is to be paid for by the applicant. This is in addition to any audit DOE may perform.

DOE has simplified the payment calculations proposed in paragraph (e), (redesignated in the final rule as paragraph (d)), to assist qualified renewable energy facilities in the application process. Paragraph (d) of the final rule provides that incentive payments under this part are determined by multiplying the number of kilowatt-hours calculated under § 451.9(c)(2) by 1.5 cents per kilowatt-hours, adjusted for inflation.

DOE proposed under paragraph (g), (redesignated in the final rule as paragraph (e)), a procedure to deal with the possibility that there could be insufficient appropriations to make the full incentive payments. In the event that the funds available to be obligated under this program are less than the amount required to make full payments to all qualifed applicants, the proposed procedure provided payment first (and, if necessary, pro rata payment) to all owners and operators of solar, wind, geothermal, and closed-loop biomass facilities, and payment second (and, if necessary, pro rata payment) to owners and operators of all other qualified facilities. DOE received both comments favoring retention of this priority payout approach and comments suggesting elimination of this approach. Those favoring its retention cited the limited market penetration of many of the technologies designated for priority payment. They also cited the preferential treatment accorded emerging rather than commercial renewable technologies in other portions of the Energy Policy Act and asserted that the legislation's authors

did not intend payments for technologies already on sound commercial footing. Comments suggesting elimination of this priority payment system cited diminished opportunities to encourage investment by the large number of utilities considering facilities based on second priority payment technologies. They also stated that the priority payment system reduces incentives for recovering value from otherwise non-revenue generating waste management facilities and for achieving climate change benefits through conversion to energy production of methane emitting landfills and agricultural waste sites. After carefully considering all comments, DOE elected to retain the priority payment system as originally proposed. In reaching this position, DOE was influenced by four considerations: (1) a major objective of the program is to assist commercialization of emerging renewable technologies; (2) with equal priorities for all technologies, the incentive value of the program for solar, wind, geothermal, and closed-looped biomass technologies is reduced due to uncertainty regarding the adequacy of annual funding to make full payment to all recipients; (3) the establishment of a priority payment category increases the incentive for investment in the priority technologies since the probability of adequate annual funding for payment to that category is higher; and (4) the establishment of a set of preferred renewable technologies that are consistent with those identified in the tax incentive sections 1914 and 1916 of the Energy Policy Act results in closer comparability of renewable energy incentives available to tax and non-tax paying entities.

Several commenters provided suggestions regarding payout procedures, including: (a) using available funds to establish an escrow account to cover 10-year payment to owners or operators to early on-line qualified facilities based on facility start-up date; and (b) establishment of a 10-year escrow system based on the date applications are received. Both of these approaches have the potential for providing full payout to a limited number of program participants, but they also result in a larger number of participants receiving no payments. In addition, they do not increase the incentive value of the program since the certainty of receiving payments would be known only after the facility became operational. For the foregoing reasons, DOE did not adopt these proposals in the final rule.

Several of the commenters who recommended a 10-year escrow account argued that potential investors in new renewable energy facilities are unlikely to take account of payments under this program in assessing an investment without assurances, at the time of investment, that the full schedule of payments would be made. DOE believes this argument has merit. However, additional work by DOE and its stakeholders is needed to develop a payout approach that will maximize the effectiveness of the program as an incentive for promoting incremental investment in new renewable energy facilities. DOE intends to publish a notice in the near future that invites suggestions from interested persons regarding possible program modifications, including possible statutory or regulatory changes, that can increase the incentive value of this effort.

Other Comments

In the preamble of the proposed rule, DOE stated that it had considered the inclusion of a requirement that to be considered qualified for receipt of incentive payments, a facility must be purchased and installed without assistance from other Federal programs. In consideration of the comments received and the absence of this restriction in this legislation, DOE did not include such a requirement in the final rule.

III. Regulatory Review

DOE, in consultation with the Office of Management and Budget (OMB) has concluded that this is not a significant regulatory action because it does not meet the criteria which define such actions under Executive Order 12866, 58 FR 51735, and is therefore exempt from regulatory review. Accordingly, no clearance of this rule under the provisions of Executive Order 12866 is required.

IV. Review Under Executive Order 12778

Section 2 of Executive Order 12778 instructs each agency to adhere to certain requirements in promulgating new regulations. These requirements, set forth in sections 2(a) and (b)(2), include eliminating drafting errors and needless ambiguity, drafting the regulation to minimize litigation, providing clear and certain legal standards for affected legal conduct, and promoting simplification and burden reduction. Agencies are also instructed to make every reasonable effort to ensure that the regulation describes any administrative proceeding to be available prior to judicial review and any provisions for the exhaustion of administrative remedies. DOE certifies that this rule meets the requirements of section 2 (a) and (b) of Executive Order 12778.

V. Review Under Executive Order 12612

Executive Order 12612, 52 FR 41685 (October 30, 1987), requires that regulations, rules, legislation, and any other policy actions be reviewed for any substantial direct effects on States, on the relationship between the national Government and the States, or on the distribution of power among various levels of Government. If there are sufficient substantial direct effects, then the Executive Order requires preparation of a federalism assessment to be used in all decisions involved in promulgating or implementing a policy action. This rule, which provides financial incentives to States and others, will not have a substantial direct adverse effect on the institutional interests or traditional functions of States.

VI. Review Under the Regulatory Flexibility Act

DOE published a determination in the Notice of Proposed Rulemaking (59 FR 24982, May 13, 1994) that the proposed rule will not have a significant impact on small entities. One comment was received addressing this determination. The Small Business Administration (SBA) stated that DOE's certification was incorrect because municipalities with a population of less than 50,000 are classified as small organizations under the Regulatory Flexibility Act and the Small Business Administration size standard for an electric utility is the disposition of four million megawatt-hours per year. DOE agrees with the SBA characterization of such entities. It is the Department's view that no regulatory flexibility analysis is warranted because there is no reason to conclude that the regulations will have a significant adverse economic impact. The commenter did not identify any such impacts, and DOE understands that the renewable energy production incentive is only one of many factors in determining whether a qualified facility is to be constructed.

The SBA requested that DOE examine alternatives that would widen the availability of the production incentives through revising the two-tier allocation process and by treating all biomass technologies equally when there are insufficient appropriations to fund each eligible project. DOE acknowledges that small municipalities may have

opportunities to develop biomass projects which are not closed-loop, but DOE has chosen to retain the two-tier approach for reasons addressed in the discussion of section 451.9 in the Preamble. We note that the two-tier system does not impose regulatory burdens on any party, but merely allocates benefits in the circumstance of insufficient appropriations. In enacting the Regulatory Flexibility Act, Congress was primarily concerned with the high cost of compliance with regulations of general and uniform applicability which place disproportionate burdens upon small businesses bound to conform their conduct to those regulations. See S. Rep. No. 878, 96th Cong., 2d Sess. 3, 6–7, reprinted in 1980 U.S. Code Cong. & Ad. News 2788, 2790, 2793–2794. Those concerns do not apply to this rule.

VII. Review Under the Paperwork Reduction Act

New information collection requirements subject to the Paperwork Reduction Act, 44 U.S.C. 3501, et seq., and record keeping requirements are contained in the provisions of this regulatory action. Accordingly, this rule was submitted to the Office of Management and Budget for review and approval of paperwork requirements. The final rule was resubmitted for OMB clearance of information collection requirements because of substantial changes. On July 12, 1995, OMB approved the collection of information through July 31, 1998, and assigned approval number 1910–0068.

VIII. Review Under the National Environmental Policy Act

Pursuant to the Council on Environmental Quality Regulations (40 CFR 1500–1508), the Department of Energy has established guidelines for its compliance with the provisions of the National Environmental Policy Act NEPA) of 1969 (42 U.S.C. 4321, *et seq.*). Pursuant to Appendix A of Subpart D of 10 CFR Part 1021, National Environmental Policy Act Implementing Procedures (57 FR 15122, 15152, April 24, 1992 (Categorical Exclusion A6), the Department of Energy has determined that this rule is categorically excluded from the need to prepare an environmental impact statement or environmental assessment.

List of Subjects in 10 CFR Part 451

Electric utilities, Grant programs, Solar energy.

Issued in Washington, DC, on July 13, 1995.

Christine A. Ervin,

Assistant Secretary, Energy Efficiency and Renewable Energy.

For the reasons set forth in the preamble, title 10, chapter II of the Code of Federal Regulations is amended by adding new Part 451 to read as set forth below:

PART 451—RENEWABLE ENERGY PRODUCTION INCENTIVES

Sec.

Authority: 42 U.S.C. § 7254; 42 U.S.C. § 13317.

§ 451.1 Purpose and scope.

(a) The provisions of this part cover the policies and procedures applicable to the determinations by the Department of Energy (DOE) to make incentive payments for electric energy generated and sold by a qualified renewable energy facility owned by a State or nonprofit electric cooperative under the authority of 42 U.S.C. 13317.

(b) Determinations to make incentive payments under this part are not subject to the provisions of 10 CFR part 600 and such payments shall not be construed to be financial assistance.

§ 451.2 Definitions.

As used in this part—

Closed-loop biomass means any organic material from a plant which is planted exclusively for purposes of being used at a qualified renewable energy facility to generate electricity or from a second harvesting of such a plant if planted before October 1, 1993.

Deciding Official means the Assistant Secretary for Energy Efficiency and Renewable Energy (or any DOE official to whom the authority of the Assistant Secretary may be redelegated by the Secretary of Energy).

DOE means the Department of Energy.

Finance Office means the DOE Office of the Chief Financial Officer (or any office to which that Office's authority may be redelegated by the Secretary of Energy).

Fiscal year means the Federal fiscal year beginning October 1 and ending on September 30 of the following calendar year.

Net electric energy means the metered kilowatt-hours (kWh) generated and sold, and excludes electric energy used within the renewable energy facility to power equipment such as pumps, motors, controls, lighting, heating, cooling, and other systems needed to operate the facility.

Nonprofit electrical cooperative means a cooperative association that is legally obligated to operate on a nonprofit basis and is organized under the laws of any State for the purpose of providing electric service to its members.

Renewable energy facility means a single module or unit, or an aggregation of such units, that generates electric energy which is independently metered and which results from the utilization of a renewable energy source.

Renewable energy source means solar heat, solar light, wind, geothermal energy, and biomass, except for—

(1) Heat from the burning of municipal solid waste; or

(2) Heat from a dry steam geothermal reservoir which—

(i) Has no mobile liquid in its natural state;

(ii) Is a fluid composed of at least 95 percent water vapor; and

(iii) Has an enthalpy for the total produced fluid greater than or equal to 2.791 megajoules per kilogram (1200 British thermal units per pound).

State means the District of Columbia, Puerto Rico, and any of the States, territories, and possessions of the United States.

§ 451.3 Who may apply.

Any owner, or operator with the written consent of the owner, but not both, of a qualified renewable energy facility, may apply for incentive payments for net electric energy generated from a renewable energy source and sold.

§ 451.4 What is a qualified renewable energy facility.

In order to qualify for an incentive payment under this part, a renewable energy facility must meet the following qualifications—

(a) *Owner qualifications.* The owner must be—

(1) A State or a political subdivision of a State (or agency, authority, or instrumentality thereof);

(2) A corporation or association wholly owned, directly or indirectly, by a State or a political subdivision of a State; or

(3) A nonprofit electrical cooperative.

(b) *What constitutes ownership.* The owner must have all rights to the beneficial use of the renewable energy

facility, and legal title must be held by, or for the benefit of, the owner.

(c) *Sales affecting interstate commerce.* The net electric energy generated by the renewable energy facility must be sold to another entity for consideration.

(d) *Type of renewable energy sources.* The source of the electric energy for which an incentive payment is sought must be a renewable energy source, as defined in § 451.2.

(e) *Time of first use.* The date of the first use of a newly constructed renewable energy facility, or a facility covered by paragraph (f) of this section, must occur during the inclusive period beginning October 1, 1993, and ending on September 30, 2003.

(f) *Conversion of non-qualified facilities.* Existing non-qualified facilities that are converted must meet either of the following criteria—

(1) A facility employing solar, wind, geothermal or biomass sources must be refurbished during the allowed time of first use such that the fair market value of any previously used property does not exceed 20% of the facility's total value.

(2) A facility not employing solar, wind, geothermal or biomass sources must be converted in part or in whole to a qualified facility during the allowed time of first use.

(g) *Location.* The qualified renewable energy facility must be located in a State.

§ 451.5 Where and when to apply.

(a) Pre-application and notification. (1) An applicant may submit at any time a pre-application, containing the information described in § 451.8 (a) through (e), to obtain a preliminary and conditional determination of eligibility.

(2) To assist DOE in its budget planning, the owner or operator of a qualified renewable energy facility is requested to provide notification at least 6 months in advance of when a facility is expected to be first used, providing projected information specified in § 451.8 (a) through (e).

(b) Application. (1) Except as provided by paragraph (b)(2) of this section, an application for an incentive payment for electric energy generated and sold in a fiscal year must be filed during the first quarter (October 1 through December 31) of the next fiscal year.

(2) For energy generated and sold in fiscal year 1994, an application for incentive payment must be filed on or before September 5, 1995.

(3) Failure to file an application in any fiscal year for payment for energy generated in the preceding fiscal year shall disqualify the owner or operator from eligibility for any incentive payment for energy generated in that preceding fiscal year.

(c) Where. Applications and notifications to the Department shall be submitted to the Renewable Energy Production Incentive Program, U.S. Department of Energy, Golden Field Office, 1617 Cole Boulevard, Golden, CO, 80401.

§ 451.6 Duration of incentive payments.

Subject to the availability of appropriated funds, DOE shall make incentive payments under this part with respect to a qualified renewable energy facility for 10 fiscal years. Such period shall begin with the fiscal year in which application for payment for electricity generated by the facility is first made and the facility is determined by DOE to be eligible for receipt of an incentive payment. The period for payment under this program ends with fiscal year 2013.

§ 451.7 Metering requirements.

The net electric energy generated and sold (kilowatt-hours) by the owner or operator of a qualified renewable energy facility must be measured by a standard metering device that—

(a) Meets generally accepted industry standards;

(b) Is maintained in proper working order according to the instructions of its manufacturer; and

(c) Is calibrated according to generally accepted industry standards.

§ 451.8 Application content requirements.

An application for an incentive payment under this part must be signed by an authorized executive official and shall provide the following information—

(a) A statement indicating that the applicant is the owner, of the facility or is the operator of the facility and has the written consent of an authorized executive official of the owner to file an application;

(b) The name of the facility or other official designation;

(c) The location and address of the facility and type of renewable energy source;

(d) The name, address, and telephone number of a point of contact to respond to questions or requests for additional information;

(e) A clear statement of how the application satisfies each and every part of the eligibility criteria under § 451.4;

(f) A statement of the annual and monthly metered net electric energy generated and sold during the prior fiscal year by the qualified renewable energy facility, measured in kilowatt-hours, for which an incentive payment is requested;

(g) In the case of a qualified renewable energy facility which generates electric energy using a fossil fuel, nuclear energy, or other non-qualified energy source in addition to using a renewable energy source, a statement of the net electric energy generated, measured in kilowatt-hours, attributable to the renewable energy source, including a calculation showing the total monthly and annual kilowatt-hours generated and sold during the fiscal year multiplied by a fraction consisting of the heat input, as measured in appropriate energy units, received by the working fluid from the renewable energy sources divided by the heat input, as measured in the same energy units, received by the working fluid from all energy sources;

(h) the amounts of accrued electric energy, by sources and by year, in kilowatt-hours, for which the applicant previously applied and DOE did not make an incentive payment because of insufficient appropriations;

(i) The total amount of electric energy for which payment is requested, including the net electric energy generated in the prior fiscal year, as determined according to paragraph (f) or (g) of this section, and the accrued energy as determined according to paragraph (h) of this section;

(j) Preferred method of payment (check or wire transfer) and instructions;

(k) A statement agreeing to retain records for a period of three (3) years which substantiate the annual and monthly metered number of kilowatt-hours generated and sold, and to provide access to, or copies of, such records within 30 days of a written request by DOE; and

(l) A statement signed by an authorized executive official certifying that the information contained in the application is accurate.

(m) If a nonprofit electric cooperative, a statement certifying that no claim for tax credit has been made for the same electricity for which incentive payments are requested.

§ 451.9 Procedures for processing applications.

(a) *Supplemental information.* DOE may request supplementary information relating to the application.

(b) *Audits.* DOE may require the applicant to conduct at its own expense and submit an independent audit, or DOE may conduct an audit, to verify the number of kilowatt-hours claimed to have been generated and sold by the qualified renewable energy facility and

for which an incentive payment has been requested or made.

(c) *DOE determinations.* Upon evaluating the application and any other relevant information, DOE shall determine:

(1) Eligibility of the applicant for receipt of an incentive payment, based on the criteria for eligibility specified in this part; and

(2) The number of kilowatt-hours to be used in calculating the incentive payment, based on the sum of net electric energy generated from a qualified renewable energy source at the qualified renewable energy facility and sold during the prior fiscal year, and any accrued energy.

(d) *Calculating payments.* Subject to the provisions of paragraph (e) of this section, incentive payments under this part shall be determined by multiplying the number of kilowatt-hours determined under § 451.9(c)(2) by 1.5 cents per kilowatt-hour, and adjusting that product for inflation for each fiscal year beginning after calendar year 1993 in the same manner as provided in section 29(d)(2)(B) of the Internal Revenue Code of 1986, except that in applying such provisions calendar year 1993 shall be substituted for calendar year 1979.

(e) *Insufficient Funds.* The Assistant Secretary for Energy Efficiency and Renewable Energy shall determine the extent to which appropriated funds are available to be obligated under this program for each fiscal year. If funds determined to be available under the preceding sentence are not sufficient to make full incentive payments for all approved applications, DOE shall—

(1) Make incentive payments first, and if necessary on a pro rata basis, to owners or operators of qualified renewable energy facilities using solar, wind, geothermal, and closed-loop biomass technologies;

(2) Make incentive payments second, and if necessary on a pro rata basis, to owners or operators of all other qualified renewable energy facilities.

(3) Treat the number of kilowatt-hours for which an incentive payment is not made as a result of insufficient appropriations as accrued energy for which subsequent application for incentive payment may be made.

(f) *Notice to applicant.* After calculating the amount of the incentive payment under paragraphs (e) through (g) of this section, the DOE Deciding Official shall then issue a written notice of the determination to the applicant—

(1) Approving the application as eligible for payment and forwarding a copy to the DOE Finance Office with a request to pay;

(2) Setting forth the calculation of the approved amount of the incentive payment; and

(3) Stating the amount of accrued energy, measured in kilowatt-hours, for each qualified renewable energy facility, if any, and the energy source for same.

(g) *Disqualification.* If the application does not meet the requirements of this part or some of the kilowatt-hours claimed in the application are disallowed as unqualified, the Deciding Official shall issue a written notice denying the application in whole or in part with an explanation of the basis for denial.

§ 451.10 Administrative appeals.

(a) In order to exhaust administrative remedies, an applicant who receives a notice denying an application in whole or in part shall appeal, on or before 45 days from date of the notice issued by the DOE Deciding Official, to the Office of Hearings and Appeals, 1000 Independence Avenue, S.W., Washington, D.C. 20585, in accordance with the procedures set forth in subpart C of 10 CFR part 1003.

(b) If an applicant does not appeal under paragraph (a) of this section, the determination of the DOE Deciding Official shall become final for DOE and judicially unreviewable.

(c) If an applicant appeals on a timely basis under paragraph (a) of this section, the decision and order of the Office of Hearings and Appeals shall be final for DOE.

(d) If the Office of Hearings and Appeals orders an incentive payment, the DOE Deciding Official shall send a copy of such order to the DOE Finance Office with a request to pay.

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FEDERAL HOUSING FINANCE BOARD

12 CFR Parts 937 and 939

[No. 95–06]

Repeal of the Nondiscrimination in Federally Assisted Programs and Housing Opportunity Allowance Program Regulations

AGENCY: Federal Housing Finance Board.

ACTION: Final rule.

SUMMARY: The Federal Housing Finance Board (Board) is repealing two regulations it has determined are no longer necessary. This is intended to reduce excess regulation, eliminate obsolete regulations and avoid any public confusion as to the nature of the Board's activities. The two obsolete regulations relate to the housing opportunity allowance program and nondiscrimination in federally assisted programs.

DATES: This final rule is effective on July 19, 1995.

FOR FURTHER INFORMATION CONTACT: Brandon B. Straus, Attorney-Advisor, Office of General Counsel, (202) 408–2589, Federal Housing Finance Board, 1777 F Street, NW., Washington, DC 20006.

SUPPLEMENTARY INFORMATION:

I. Statutory And Regulatory Background

As a result of an ongoing internal review of its regulations, the Board has identified parts 939 (Nondiscrimination in Federally Assisted Programs) and 937 (Housing Opportunity Allowance Program) as obsolete, for the reasons set forth below. Accordingly, in an effort to meet the goals of the Regulatory Reinvention Initiative of the Vice President's National Performance Review, the Board intends to repeal parts 937 and 939.

A. Part 937

Part 937 of the Board's regulations sets forth the Housing Opportunity Allowance Program (HOAP). *See* 12 CFR part 937. The HOAP initially appeared in part 527 of the regulations of the Board's predecessor agency, the Federal Home Loan Bank Board (Bank Board). When Congress abolished the Bank Board in 1989, *See* section 401 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. 101–73, 103 Stat. 183 (Aug. 9, 1989), (codified at 12 U.S.C. 1437 note), part 527 was redesignated as part 937 of the Board's regulations. *See* 54 FR 36759 (Sept. 5, 1989).

The Bank Board established the HOAP to implement section 101 of the Emergency Home Finance Act of 1970 (EHFA). *See* Pub. L. 91–351, sec. 101, 84 Stat. 450 (July 24, 1970) (codified at 12 U.S.C. 1430 note (1988) (*removed,* 12 U.S.C. 1430 (Supp. IV 1992)). Section 101 of the EHFA authorized the appropriation of $250 million, without fiscal year limitation, to be used by the Bank Board for disbursement to the Federal Home Loan Banks (Banks) for the purpose of adjusting the effective interest rates on shorter, and long-term advances to members, the proceeds of which were to be used to assist in providing housing for low- and middle-income families. *See* EHFA sec. 101, 84 Stat. 450.